

PROGRESS REPORT

Comm 47 CODE ADVISORY COMMITTEE

DATE: Wednesday, June 2, 2004

TIME: 9:00 a.m. – 3:00 p.m.

LOCATION: Tommy G. Thompson Commerce Center
Conference Room 3B
201 West Washington Avenue
Madison, Wisconsin

COMMITTEE MEMBER ATTENDANCE:

Dave Blatnik	Absent	Mark Maten (Steve Oseseck)	P
Richard Blatter	A	Kevin Olson	P
Tim Clay	Present	Robert Pearson	A
Dave Diedrich	P	Boyd Possin	P
Scott Hafner (Troy Batzel)	P	Tom Reinsch	A
David Havick	P	Scott Wilson	P
George Marek	A	Wendell Wojner	P

GUESTS:

Kendra Bonderud – Legislative Fiscal Bureau
Ray de Long – REI
Joseph Drapeau – Pioneer Environmental
Brenda Halminiak – Sand Creek Consultants
Pat Heger – Bt²
Gary Henningsen – Northern Environmental

Nancy Hirlemann – Sigma Environmental
~~Steve Kaczmarek~~ – Sand Creek Consultants
Robert Langdon – Bt²
Tom Mueller, Jr. – TEMCO
Scott Rickard – Liesch Environmental

DEPARTMENT OF COMMERCE STAFF:

Oscar Herrera	James Moser
Lori Huntoon	Darin Powers
John Kisiel	Sam Rockweiler
Dennis Legler	Eric Scott
Berni Mattsson	Shawn Wenzel

Dennis Legler opened the meeting with a review of the agenda, and the Committee accepted the progress report from the preceding, April 14 meeting.

Draft rules for credentials and public bidding

In referring to the updated, draft rules that were transmitted with the meeting agenda, Sam Rockweiler explained that continuing-education requirements were added to the proposed credential rules, to offset deletion of the qualification requirements for Certified PECFA Program Managers.

Kevin Olson noted concern for changing to including, rather than excluding interest costs in the caps and thresholds in Comm 47, because consultants will not know in advance what the interest rates will be. Dennis responded that interest costs were appropriately excluded in preceding years, when extensive claim backlogs resulted in reimbursement delays of up to two years, but the backlogs and delays are much less now, so interest costs can be adequately projected, and included.

Steve Osesek asked whether work included in public bidding will be exempted from commodity bidding, and the answer was yes.

Draft rules, schedule, and classification form – for usual and customary costs

Dennis explained that developing a schedule of usual and customary (U&C) costs has been discussed over several years, in response to legislation that requires the Department to implement one. Eric Scott summarized the legislation that, prior to 1999, authorized the Department to develop the schedule, but in 1999, was changed to require implementation of the schedule, and to require the implementation through the emergency rule process. Eric presented an overview of the proposed U&C rules and schedule, which were transmitted prior to the meeting. Eric explained that a form is being developed for classifying occurrences, to enable prioritization of the work which would be directed to public bidding instead of addressed by the U&C schedule.

Eric explained that the maximum reimbursable unit costs in the schedule are being developed in part by looking at rules and rates in about 10 other States, and at survey data which was collected during previous efforts to develop a U&C schedule – and are based on a premise of addressing items which are commonly associated with PECFA claims. Lori Huntoon explained that the U&C schedule would likely address the more routine, smaller scopes of work, where unit costs are fairly well established, whereas public bidding would apply to the more involved sites.

Boyd Possin asked whether the U&C rate for complex site investigation reports would be the same as for simple reports, and the answer was yes. Scott Wilson asked how administrative elements would be addressed in the schedule, and Eric referred to the regulatory correspondence entry. James Moser added that administrative elements are also addressed, where appropriate, in other entries in the schedule. As an example, James demonstrated, through a spreadsheet that was transmitted prior to the meeting, how maximum reimbursable unit costs were derived for the

schedule's entry for the task of groundwater sampling. Eric noted that the costs for the various components of the task, which were shown in the spreadsheet, are not fixed rates – and only the overall total for the task, which is shown in the schedule, is a fixed rate. In addition, activities related to a task that are more directly addressed in another task in the schedule, such as laboratory analysis or regulatory correspondence, are not included as components on the spreadsheet. For example, field filtering is reflected in the unit costs for laboratory services, rather than in groundwater sampling.

There was concern for whether work by subcontractors would be paid through the consulting firms, since that could increase the policy premiums for errors and omissions insurance. James explained that subcontractor invoices could be submitted separately, rather than through the firms. Eric noted that although the unit costs are captured by the schedule, the scopes of work, such as how often or how many times sampling should occur, generally are not addressed.

Boyd noted concern that even if the U&C schedule is a good idea, knowing how it is going to function, before implementing it, would be important to making it function effectively. Boyd emphasized that the maximum reimbursable unit costs, which were not yet shown in the draft schedule, should be released prior to the effective date of the rules and schedule, and the effective date should be postponed long enough for responsible parties and consultants to make corresponding adjustments. According to Boyd, release of the unit costs prior to the effective date would not result in unfair competitive advantages.

Eric distributed and presented a PowerPoint® display of how occurrences would be addressed by either public bidding or the U&C schedule, under the proposed rules, and he estimated that about 2600 existing occurrences would be affected. Eric showed how under the proposed rules, the current public bidding process would be changed to apply in a prioritized manner that would address the greatest threats to human health and the environment first. According to Eric, work on sites that pose the greatest threats to human health and the environment which is not addressed by the U&C schedule and which is not included in public bidding would be reimbursed similar to how it is currently being reimbursed, until the site is publicly bid or closed.

Lori commented that the form for classifying occurrences, and its instructions, as shown in Eric's display, would be sent to the responsible party for each occurrence, and Boyd suggested sending a copy to the consultant for each occurrence. Eric explained that the form would be sent out for every site for which a release was reported prior to the effective date of the rule, and which has not received a closure or conditional closure letter. Tim Clay recommended that a letter for transmitting the form to responsible parties should be written in plain language.

Scott Wilson suggested including an entry on the form that the consultant or responsible party could use to identify occurrences where closure can be achieved for \$60,000 or less. Dennis indicated that entry could undesirably result in the form being substituted for the formal notification to the Department that is required for those occurrences, under section Comm 47.339.

Ray de Long asked whether the form would be needed for sites submitted for closure, and the answer was yes, because that closure could be delayed or denied. Eric noted the form will also be needed for sites which are scheduled for bidding but which have not yet been included in a bidding round. Ray asked whether Web-based reporting would be more effective than use of the form, and was informed that the Department's information technology staff were not able to develop a Web-based process by the expected effective date of the rules. Eric noted that a signature by the responsible party is not needed on the form.

Dave Diedrich asked when claim submittals would be required, and Dennis agreed to look at whether more submittal milestones would be helpful under the proposed rules.

Boyd asked what reimbursement limits would apply to activities which are not on the U&C schedule and which are not included in bidding. Reference was made to the criteria proposed in Comm 47.325 (6) (b) for the Department to specify a remediation cap for those activities.

Usual and customary invoice form

Staff distributed a draft standardized invoice form that included an entry for every task on the U&C schedule. As an example, staff explained that if a lab fee is less than the unit cost on the schedule, and the lab fee is paid by the consultant, the consultant could seek reimbursement for the higher cost on the schedule.

Dave Havick asked whether the form is a claim submittal form or an invoice. Staff explained that the form could be used as a billing summary, and could include individual invoices from consultants and commodity providers. James Moser said the form should not be submitted more frequently than once a month. Scott Wilson commented that to use the form as a billing summary or statement, modifications would be needed for the invoice text on the first page.

Scott noted concern for the contract-type language in the certification statements on the fourth page of the form. John Kisiel explained that the language was developed with the Justice Department, and was intended to establish that signing the statement would make each submittal of a fraudulent document a criminal act. Dave Diedrich indicated the certification statement by the claimant would be good, and is long overdue.

There was interest in converting the form to a spreadsheet, and staff noted the submitted forms could be used as a resource during the Department's semiannual review and update of the U&C schedule.

Gary Henningsen suggested submitting a separate form with each invoice. Dave Diedrich suggested expanding the report-preparation-breakdown page to show cross-references to the task numbers on the U&C schedule.

Eric explained that the form was developed on the premise that all commodity work would be charged through the consultants, but relabeling the column for "consultant" costs as "actual" costs could address submittal of the commodity costs directly to the Department, rather than

through the consultant. There was interest in combining the column for actual costs with the column for "amount claimed," but Tim Clay noted responsible parties may want to see both columns. Boyd asked whether the actual cost is the full cost, or the cost to the responsible party. Gary asked whether the amount claimed could exceed the actual cost. Tom Mueller recommended combining the two columns because both amounts will always be shown as the same, and the information will be misleading because it will not show where actual costs are less than the amount claimed.

For reporting of costs that are not addressed by the U&C schedule, staff explained that the current reporting process should be used. There was interest in adding a separate sheet to the form for those costs.

General discussion

Boyd noted that the U&C schedule would establish lump-sum reimbursement amounts, whereas the past practice has been to reimburse for time and materials. In reference to the maximum excavation of 110 tons that is listed in the schedule, Boyd asked whether a need to excavate 200 tons would automatically result in directing the entire project to public bidding; or whether bidding would be applied to the excavation in excess of 110 tons, and not be applied to the rest of the work. Lori responded that all of the remediation work in excess of the 110-ton excavation would have the potential for being directed to bidding, but could be deferred from bidding while higher-ranking work is directed there first.

In response to a concern for complex emergency actions, Berni noted that the exemption from the U&C schedule for the initial 72 hours could be extended by the Department, where appropriate. James Moser added that those actions generally are likely to be beyond the scope of usual and customary costs.

Scott Wilson questioned why travel time was not shown as a component in the spreadsheet example for the groundwater sampling task on the schedule. Boyd noted the absence of that travel time further demonstrated a need for the Department to release the other maximum reimbursable cost data. Berni agreed the entire draft of the proposed rules, including the maximum reimbursable unit costs in the schedule, would be distributed by about June 15, in advance of an anticipated effective date of July 1 for the emergency rules implementing the U&C schedule.

Next meeting

The next meeting was scheduled for August 5, 2004, at the same time and location, with an expectation the discussion would focus on the public-hearing comments on the proposed rules, and the Department's response to the comments.